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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-433

MARCUS A. ARNHEITER,
Petitioner,

vs.

RANDOM HOUSE, INC. and NEIL SHEEHAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Marcus Arnheiter (hereinafter "petitioner") seeks review in this Court of the denial of his motion to vacate a final judgment before that denial has been reviewed by the Court of Appeals. Petitioner, however, has failed to make any showing that this case is related to any case pending before this Court or that it is of such imperative public importance that the ordinary appellate processes should be circumvented. In any event, there is no merit to petitioner's claim of abuse of discretion.

QUESTIONS PRESENTED BY THE PETITION

The questions presented by the petition are:

(1) Is this case related to any case pending in this Court? and

(2) Is this case of such imperative public importance as to justify deviation from the normal appellate processes?

Both these questions must be answered in the negative, and the petition for certiorari therefore should be denied. The question which petitioner seeks to have reviewed, but which this Court need not consider, is whether the district court abused its discretion in declining to vacate a final judgment which was entered November 5, 1975, and affirmed by the United States Court of Appeals for the Ninth Circuit on July 17, 1978.

STATUTES AND RULES

Sections 1254(1) and 2101(c) and (e) of Title 28 of the United States Code (62 Stat. 928, 962; 63 Stat. 104), Rule 60(b) of the Federal Rules of Civil Procedure and Rule 20 of the Rules of the United States Supreme Court are reproduced in the Appendix to this Brief.

STATEMENT OF THE CASE

A. The facts of the Western Action.

In January 1972, Neil Sheehan authored and Random House published a book entitled *The Arnheiter Affair*. The book reported events about petitioner's command of a U.S. Navy warship on patrol off the coast of South Vietnam, petitioner's removal from command, and petitioner's extensive but unsuccessful efforts to prove that he had acted correctly and that the Navy wrongfully had relieved him of command.

In February 1972, petitioner filed in the Northern District of California an action alleging that he had been libeled by respondents Sheehan and Random House (the "Western Action"). During the next three and one-half years, petitioner conducted extensive discovery: Sheehan produced to petitioner his voluminous research materials; both Random House and Sheehan responded to lengthy interrogatories; and petitioner deposed both Sheehan and a representative of Random House. Respondents then moved for summary judgment on the ground that petitioner, who was a public official and a public figure, could not meet his constitutional burden of proving that the alleged defamations were made by respondents with "actual malice" (*New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254). By order dated November 5, 1975, the district court found that plaintiff "ha[d] not met and could not, with further discovery, meet the burden placed upon him [under *New York Times Co.* v. *Sullivan*]," and it granted summary judgment for defendants.

On appeal, the judgment was affirmed (*Arnheiter* v. *Random House, Inc.* (9 Cir. 1978) 578 F.2d 804). The Ninth Circuit held that petitioner was both a public official and a public figure, that actual malice had not been shown, and that there had been no abuse of discretion in denying further discovery (578 F.2d 805-806). No petition for certiorari was filed from that judgment.

Almost one full year after the Ninth Circuit's affirmance, petitioner filed in the Northern District of California a motion purportedly under Rule 60(b) of the Federal Rules of Civil Procedure to vacate that court's prior judgment.

The sole ground urged in support of the motion was that certain appellate decisions,[1] totally unrelated to his litigation, warranted relief. On August 17, 1979, the district court denied petitioner's motion and, having found that the motion was frivolous, groundless and vexatious, imposed sanctions of $300 against petitioner and his counsel. Petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on August 29, 1979, and the proceeding is now pending before that Court. Petitioner filed the instant petition for certiorari in September 1979, seeking review by this Court prior to a decision by the Court of Appeals.

B. The facts of the Eastern Actions.

In April 1972, Neil Sheehan was interviewed on a television talk show concerning his book. In June 1972, petitioner commenced an action in the Southern District of New York, alleging libel by reason of the broadcast. Subsequently, Dell Publishing Co. Inc. published a paperback edition of *The Arnheiter Affair*. In June 1973, petitioner commenced yet another libel action, again in the Southern District of New York, this time based on the paperback. Defendants' motions for summary judgment in those libel actions were granted, and judgments were entered in October 1978.

[1]Petitioner cited *Wolston* v. *The Reader's Digest Association, Inc.* (June 26, 1979) ... U.S. ..., 47 U.S.Law Week 4840, *Hutchinson* v. *Proxmire* (June 26, 1979) ... U.S. ..., 47 U.S.Law Week 4827, and *Herbert* v. *Lando* (April 18, 1979) ... U.S. ..., 47 U.S.Law Week 4401, decided by this Court, and the California Supreme Court's decision in *Good Government Group of Seal Beach, Inc.* v. *Superior Court* (1978) 22 Cal.3d 672, certiorari denied (May 21, 1979) ... U.S. ..., 47 U.S.Law Week 3761.

In June 1978, Donald G. Brownlow, the author of a manuscript on petitioner's exploits, commenced an antitrust action in the Southern District of New York, alleging that a conspiracy in restraint of trade had blocked the publication of his manuscript. The district court dismissed that action in November 1978.

In May 1979, the United States Court of Appeals for the Second Circuit heard appeals from the two libel actions and the antitrust action filed in the Southern District of New York (hereinafter collectively referred to as the "Eastern Actions"), and it affirmed all three judgments on May 18, 1979. On August 17, 1979, a petition for certiorari seeking review of these three actions was filed and docketed as case No. 79-281.

ARGUMENT

I. THE ONLY ISSUE RAISED BY THE PETITION IS DISTINCT FROM THAT IN THE EASTERN ACTIONS AND IS WITHOUT IMPERATIVE PUBLIC IMPORTANCE JUSTIFYING DEVIATION FROM NORMAL APPELLATE PROCESSES.

The issue presented in the proceedings pending before the Court of Appeal is a simple one: whether the district court abused its discretion when it denied a motion under Federal Rule of Civil Procedure 60(b). The issues in the Eastern Actions relate to the propriety of three different judgments of dismissal, and they are wholly separate.[2]

[2]One argument against granting the petition in the Eastern Actions is relevant here. The petition in No. 79-281 was filed more than 90 days after entry of judgment by the Court of Appeals, without an extension having been granted. The petition in No. 79-281 should therefore be denied as untimely (28 U.S.C. § 2101(c) and Rules 13 and 22 of this Court; see generally Br. of Resps. in Opposition, No. 79-281, pp. 19-20). Inasmuch as petitioner bases the petition in No. 79-433 on the pendency of the petition in the Eastern Actions, this petition should also be denied.

In any event, exercise of the Court's certiorari jurisdiction before judgment by the Court of Appeals is properly reserved "for extremely important cases, in which the public interest require[s] an immediate authoritative decision" (R. Stern and E. Gressman, Supreme Court Practice (5th Ed. 1978) p. 55). The Western Action may well be of personal interest to petitioner. But, unlike cases in which the Court has exercised certiorari jurisdiction before judgment by the Court of Appeals (e.g., *United States* v. *Nixon* (1974) 418 U.S. 683 (Watergate tapes case[3]); *Youngstown Co.* v. *Sawyer* (1952) 343 U.S. 579 (steel mills seizure case); *United States* v. *Mine Workers* (1947) 330 U.S. 258 (John L. Lewis contempt case); *Ex parte Quirin* (1942) 317 U.S. 1 (wartime saboteur case)), this case lacks any paramount public interest to "justify the deviation from normal appellate processes" (Rule 20 of this Court).

II. IN ANY EVENT, THE DISTRICT COURT PROPERLY DENIED PETITIONER'S RULE 60(b) MOTION.

A. Rule 60(b) does not contemplate relief from judgment on the basis of new legal decisions.

Petitioner argues that he was entitled to have the judgment against him vacated because of certain appellate decisions in cases totally unrelated to his litigation. Without citing a single supportive authority, petitioner predicated the motion on Rule 60(b) of the Federal Rules of Civil Procedure which, in pertinent part, provides:

[3]In the Watergate case, the Court dismissed as improvidently granted the President's cross-petition, which raised the issue whether the grand jury had acted within its authority in naming the President an unindicted coconspirator (418 U.S. 687, n. 2). While of obvious importance to the President, the issue was not of paramount public importance.

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b) seeks to buttress the finality of judgments while providing some relief from unjust judgments (7 Moore, Federal Practice (2d Ed. 1979) (hereinafter "Moore") ¶ 60.27[1], p. 340). The rule, however, is not a substitute for appeal (*Eutectic Corp.* v. *Metco, Inc.* (2 Cir. 1979) 597 F.2d 32, 34; *Martella* v. *Marine Cooks & Stewards U., Seafarers Int. U.* (9 Cir. 1971) 448 F.2d 729, 730, certiorari denied (1972) 405 U.S. 974; Moore, ¶ 60.18[8], p. 217, and ¶ 60.27[1], p. 348), and it is reserved for extraordinary circumstances (*Klapprott* v. *United States* (1949) 335 U.S. 601; see also *Ackermann* v. *United States* (1950) 340 U.S. 193, 199; *Martella* v. *Marine Cooks*, supra, 448 F.2d 730). No extraordinary circumstances attended petitioner's motion.

Moreover, it is settled that Rule 60(b) does not authorize relief simply because the law applied initially has been overruled or declared erroneous in another, unrelated proceeding (*Title* v. *United States* (9 Cir. 1959) 263 F.2d 28, 31, certiorari denied (1959) 359 U.S. 989; also see *Lubben* v. *Selective Service System Local Bd. No. 27* (1 Cir. 1972) 453 F.2d 645, 650; *Berryhill* v. *United States*

(6 Cir. 1952) 199 F.2d 217, 219; *Schmidt* v. *Schubert* (E.D. Wis. 1978) 79 F.R.D. 128, 129; *Loucke* v. *United States* (S.D.N.Y. 1957) 21 F.R.D. 305, 308). As the court stated in *Collins* v. *City of Wichita, Kansas* (10 Cir. 1958) 254 F.2d 837, 839:

> "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside."

In this case, as in *Collins,* petitioner appealed and lost; his appellate remedies were exhausted, and the litigation concluded.

B. Moreover, the recent decisions of this Court cited by petitioner would effect no change in the result of the underlying litigation.

There is no basis for petitioner's contention that his status as a public official and a public figure is affected by this Court's recent decisions. In both *Wolston* v. *Reader's Digest Association, Inc.* (June 26, 1979) ..... U.S. ....., 47 U.S. Law Week 4840, and *Hutchinson* v. *Proxmire* (June 26, 1979) ..... U.S. ....., 47 U.S.Law Week 4827, the Court reversed findings of "public figure" status because, in each case, the plaintiff had not thrust himself or his views into public controversy (*Wolston,* supra, 47 U.S.Law Week 4842; *Hutchinson,* supra, 47 U.S.Law Week 4834). In this case, however, petitioner "courted massive publicity" and even instigated a congressional inquiry into his removal *before* publication of the allegedly libelous book (578 F.2d 805).

Nor is there any basis for petitioner's claim that this Court's decision in *Herbert* v. *Lando* (April 18, 1979) ..... U.S. ....., 47 U.S.Law Week 4401, entitles him to reopen a final judgment and undertake further discovery. In the *Herbert* case, this Court rejected a television producer's bid to establish a constitutional privilege foreclosing direct inquiry into the editorial process. In doing so, however, the Court cautioned: "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy,* and *inexpensive* determination of every action'" (47 U.S.Law Week 4407) (emphasis of Court). The Court specifically left open the nonconstitutional question whether the trial court had properly applied the rules of discovery (id.). In the instant case, petitioner conducted extensive discovery over a period of more than three and one-half years, and, in 1975, the district court held that "plaintiff ha[d] not met and could not, with further discovery, meet the burden placed upon him" (Order, dated November 5, 1975). The Ninth Circuit affirmed that discovery ruling (578 F.2d 805).[4] Thus, far from advancing petitioner's cause, the *Herbert* case defeats it.

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[4]This Court has never held that summary judgment is prohibited in constitutional libel cases. Nor, contrary to petitioner's suggestion (Pet. in No. 79-433, p. 14), did the trial court in the Western Action grant summary judgment on the basis of some "rule of thumb." The district court simply held that petitioner had not met and could not meet his constitutional burden. After affirmance by the Ninth Circuit, that decision became final.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX A

APPENDIX

Statutes

28 U.S.C. § 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree" (62 Stat. 928, 962).

28 U.S.C. § 2101(c): "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days" (63 Stat. 104).

28 U.S.C. § 2101(e): "An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment" (63 Stat. 104).

Rules

Federal Rules of Civil Procedure, Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated

intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rules of the Supreme Court of the United States, Rule 20: "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v.

Fontenot, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579."